IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| RICHARD C. BEALS, Plaintiff/Appellant, v. ROBERT L. MOORE, dba KACHINA INSULATION, Defendant, | ) | 2 CA-CV 2008-0090 DEPARTMENT A |
| ALPINE INSULATION, INC., Garnishee/Appellee. | ) | MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20060743

Honorable John E. Davis, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

**¶1** Appellant Richard Beals appeals from the judgment entered after a bench trial in favor of appellee Alpine Insulation, Inc., which Beals had sought to garnish as a fraudulent transferee or successor corporation of his judgment debtor, Robert Moore and Kachina Insulation (collectively "Kachina"). Beals argues the trial court erred in rejecting those theories of recovery against Alpine after finding that nothing of value had been transferred from Kachina to Alpine. Finding no reversible error, we affirm.

**Background**

**¶2** "On appeal, we view the evidence in the light most favorable to sustaining the trial court's judgment." *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 328, 836 P.2d 1034, 1038 (App. 1992). In April 2006, Beals obtained a judgment against Moore, doing business as Kachina, an insulation installation business Moore owned. Kachina stopped operating around mid-2006. Alpine was incorporated in June and began operating in September 2006 installing insulation. Mike Purcell was Alpine's sole shareholder. Alpine was located in the same building, owned by Purcell's parents, in which Kachina had operated. Alpine also employed five workers and a salesman who had been

Kachina employees. Although Moore provided some advice to Alpine in "getting started to get up and running," he was not paid by Alpine and did not have any interest in the company.

**¶3** Seeking to collect on his judgment against Kachina, Beals applied for a writ of garnishment against Alpine in late September 2006, shortly after it began operating. Beals alleged Alpine was, inter alia, "holding nonexempt monies on behalf of" Kachina or that Moore was "the owner of shares in [the] corporation, or ha[d] a proprietary interest in the corporation." In its answer to the writ, Alpine claimed it did not possess any of Kachina's or Moore's assets.

**¶4** Beals objected to Alpine's answer, asserting it "contain[ed] fraudulent representations" and "[o]wnership of property and funds owned by [Alpine was] in question." The trial court held a hearing and a bench trial on the objection, nearly a year apart, during which time Beals unsuccessfully attempted to obtain Moore's testimony. Ruling in favor of Alpine, the trial court found Moore and Kachina had "transferred no assets of value to . . . Purcell or Alpine." The court further ruled Beals had not proven that a fraudulent transfer had occurred or that Alpine was Kachina's successor. Accordingly, the court dismissed and discharged Alpine as a garnishee. This appeal followed.

## Discussion

### I. Fraudulent Transfers Act

**¶5** Beals first argues Alpine was a fraudulent transferee of Kachina and, therefore, he was "entitled to proceed with garnishment against" Alpine under A.R.S. § 44-1007. We review the trial court's factual findings, including its ruling that Alpine received "no assets of value" from Kachina, to determine if they are "clearly erroneous or not supported by substantial evidence." *Nordstrom, Inc. v. Maricopa County*, 207 Ariz. 553, ¶ 18, 88 P.3d 1165, 1170 (App. 2004); *see also* Ariz. R. Civ. P. 52(a); *Teeters*, 172 Ariz. at 328, 836 P.2d at 1038. "We review issues of statutory interpretation *de novo*." *Mohave County v. James R. Brathovde Family Trust*, 187 Ariz. 318, 320, 928 P.2d 1247, 1249 (App. 1996).

**¶6** Section 44-1007(A)(1), provides, "[i]n an action for relief against a [fraudulent] transfer" a creditor may, inter alia, obtain "[g]arnishment against the fraudulent transferee . . . in accordance with the procedure prescribed by Law in obtaining such remedy." A transfer is fraudulent as to an existing creditor such as Beals if it is made "[w]ith actual intent to hinder, delay or defraud" the creditor; if it is made "[w]ithout receiving a reasonably equivalent value in exchange" and leaves the debtor with too few assets; or "if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." A.R.S. §§ 44-1004, 44-1005.

**¶7** Thus, under these statutes, in order to obtain a garnishment or other relief, the creditor must show "by clear and satisfactory evidence" that a transfer of assets occurred with the "debtor receiving no reasonable consideration." *Gerow v. Covill*, 192 Ariz. 9, ¶ 33, 960 P.2d 55, 63 (App. 1998). The term "'[a]sset'" is defined as "property of a debtor." A.R.S.

§ 44-1001(1). "'Property' means anything that may be the subject of ownership." § 44-1001(8). And the intangible asset known as "goodwill" generally refers to "'an element responsible for profits in a business'" or a business's "reputation." *Gerow*, 192 Ariz. 9, ¶ 26, 960 P.2d at 61, *quoting Wisner v. Wisner*, 129 Ariz. 333, 337, 631 P.2d 115, 119 (App. 1981).

**¶8** Beals concedes Kachina transferred no tangible assets to Alpine, but he asserts Alpine received a "substantial transfer of goodwill and intangible assets for no consideration." He maintains Alpine "essentially assumed the entire business of Kachina" in that it hired Kachina's employees, received advice from Moore, operated the business from the same premises, and solicited Kachina's former customers. In support of his argument that a transfer of assets from Kachina to Alpine occurred, Beals points to his expert's testimony about Kachina's value at the time it closed.

**¶9** Beals's asset valuation expert testified that, as of September 2006, Kachina had a value of $163,000, "not includ[ing] the value of [its] liability."[1] He also testified that a business's value included goodwill, including the business's name, an "assembled work force," customer contracts, supplier contracts, and a customer base. The expert hypothesized that if Alpine had purchased Kachina, then the latter's work force, the advice of its owner, its customer base, and possibly its location would have value. Beals argues that testimony

[1] Beals's expert did not apportion that value between tangible and intangible assets, nor did he value any goodwill Kachina allegedly had when it closed.

"was unrebutted" and, therefore, the trial court clearly erred in failing to accept it as sufficient proof that Kachina had fraudulently transferred its intangible assets to Alpine.

**¶10** Although Beals is correct that Alpine did not present any evidence to rebut the expert's valuation of Kachina at its closing, it did present evidence that it did not receive any of Kachina's assets, intangible or otherwise. Purcell testified that Alpine had not received any favorable treatment from suppliers and, in fact, had to pay at least one a new $15,000 deposit. He stated he had hired some of Kachina's former employees, but he had spoken with them separately when he hired them and had required them to complete new paperwork. He also testified he was paying a higher rent than Kachina had paid for the same premises.

**¶11** As for Alpine's customer base, Purcell testified that, although his salesman had contacted Kachina's former customers because he had been its salesman as well, Alpine's customer list was "real different" from Kachina's because "fifteen to twenty people . . . [would not] do business with [Alpine] because of" Beals's enforcement actions against Kachina and garnishment efforts against Alpine.[2] Purcell also pointed out that, because there were "so few[] contractors in Flagstaff" where Alpine does business and because the salesman "kn[ew] most of them," the customer contacts of the two businesses would

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[2]At oral argument in this court, Beals contended his application for a writ of garnishment against Alpine, filed in late September 2006, would have had no bearing on whether Alpine previously received anything of value from Kachina when Alpine's business began. But Alpine actually commenced operations in that same month, and the fact that Moore had previously filed for bankruptcy well before this garnishment action could have influenced the trial court's finding "that Moore's business was in such a state its reputation hindered rather than advanced Alpine."

necessarily be similar. Furthermore, and importantly, Purcell testified without objection he had not received any goodwill from Moore or Kachina and his relationship with Moore had hurt Alpine more than helped it. According to Purcell, he "was the new guy on the block and . . . had to start all over."

**¶12** Additionally, although Beals's expert testified about the value of Kachina at its closing, he did not testify that Alpine had actually received any of Kachina's assets or value.[3] Thus, contrary to Beals's assertion, the trial court did not simply reject his expert's testimony.[4] Rather, the court implicitly found either Beals's evidence insufficient to support a finding that assets had been transferred or Purcell's testimony more credible as to whether Alpine had received any goodwill, ruling it was "more likely . . . that Moore's business was in such a state its reputation hindered rather than advanced Alpine." Contrary to Beals's argument, the evidence and reasonable inferences therefrom support that ruling.

**¶13** The trial court's factual findings are supported by substantial evidence, albeit evidence that was contradicted at least in part by that presented by Beals. *See Kocher v. Ariz.*

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[3]At oral argument in this court, Beals acknowledged his expert had not and could not have addressed that topic.

[4]Nothing in the record suggests the trial court arbitrarily rejected the testimony of Beals's expert. *See Nystrom v. Mass. Cas. Ins. Co.*, 148 Ariz. 208, 214, 713 P.2d 1266, 1272 (App. 1986) ("[A] trial court in civil cases may not arbitrarily reject testimony from a disinterested and unimpeached witness . . . ."). Moreover, "[e]ven expert testimony is not binding when common experience provides a basis for a contrary view." *City Consumer Servs., Inc. v. Metcalf*, 161 Ariz. 1, 5, 775 P.2d 1065, 1069 (1989); *see also State v. Schantz*, 98 Ariz. 200, 205, 403 P.2d 521, 524 (1965) ("[T]he jury was not compelled to accept the uncontradicted opinion testimony of an expert . . . .").

*Dep't of Revenue*, 206 Ariz. 480, ¶ 9, 80 P.3d 287, 289 (App. 2003) ("A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists."). We do not disagree with our specially concurring colleague that substantial evidence in the record, and reasonable inferences therefrom, might well have supported a ruling in favor of Beals. Nonetheless, "'we do not reweigh conflicting evidence or redetermine the preponderance of the evidence, but examine the record only to determine whether substantial evidence exists to support the trial court's action.'" *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, ¶ 27, 161 P.3d 1253, 1261 (App. 2007), *quoting In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999). In sum, we cannot say the trial court erred in finding that Beals failed to prove "by clear and satisfactory evidence" a fraudulent transfer of assets from Kachina to Alpine.[5] *Gerow*, 192 Ariz. 9, ¶ 33, 960 P.2d at 63.

**II. Successor corporation liability**

**¶14** Beals also contends "the business of Alpine was identical to and a continuation of the business of Kachina." On that basis, citing *Teeters*, he argues Alpine is liable for Kachina's debt. "Unless clearly erroneous, the trial court's findings of fact will not be set

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[5]We note, however, that we agree with Beals the trial court was incorrect to the extent it suggested his claim failed because he was unable to obtain Moore's testimony. As Beals argues, "the issue is not whether Moore could or would have offered any relevant testimony had he appeared, but whether the evidence that was adduced was sufficient to support [his] claims." But we disagree with Beals's further contention that the trial court clearly erred in finding that the evidence presented did not satisfy his burden of proof.

aside." *Teeters*, 172 Ariz. at 328, 836 P.2d at 1038. But, "[i]n reviewing the trial court's findings on questions of law or mixed questions of law and fact, we are entitled to 'draw [our] own legal conclusions from facts found or inferred in the judgment of the trial court . . . .'" *Id.* at 328-29, 836 P.2d at 1038-39, *quoting Huskie v. Ames Bros. Motor & Supply Co.*, 139 Ariz. 396, 401, 678 P.2d 977, 982 (App. 1984) (alteration in *Teeters*).

**¶15** A corporation that acquires the assets of another corporation generally is not liable as a successor for the debts or liabilities of its predecessor unless:

> (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation [or reincarnation] of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

*Id.* at 329, 836 P.2d at 1039, *quoting Maloney v. Am. Pharm. Co.*, 255 Cal. Rptr. 1, 3 (App. 1989); *see also Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, ¶ 16, 195 P.3d 645, 650 (App. 2008).[6] Only the "mere continuation" theory is at issue here.

**¶16** "To find a corporation is a mere continuation of a predecessor corporation there must be 'a substantial similarity in the ownership and control of the two corporations,' and 'insufficient consideration running from the new company to the old' for the assets passing

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[6]Beals also cites *Arizona State Carpenters Health & Welfare Trust Fund v. Sanders*, 162 Ariz. 116, 781 P.2d 594 (1989), and *Fall River Dyeing & Finishing Corp. v. National Labor Relations Board*, 482 U.S. 27 (1987). Those cases addressed a successor corporation's obligation under federal labor law to bargain with a union, not Arizona's common law on successor liability. Thus, as Alpine points out, "their analyses do not apply to this case."

to the new company." *Warne Invs., Ltd.*, 219 Ariz. 186, ¶ 18, 195 P.3d at 651, *quoting Teeters*, 172 Ariz. at 330, 836 P.2d at 1040. Indeed, "[a] crucial factor in determining if a successor corporation is a mere continuation or reincarnation of a predecessor corporation is whether there is a substantial similarity in the ownership and control of the two corporations (e.g., identical directors, officers, stockholders, goods and services, and location)." *Teeters*, 172 Ariz. at 329-30, 836 P.2d at1039-40. Beals concedes that "on the facts before the Court, Moore had no ownership interest in Alpine."

**¶17** Beals contends, however, Alpine received sufficient intangible assets from Kachina to support a finding that it was a mere continuation of Kachina. As Division One of this court ruled in *Warne Investments*, successor liability based on a mere-continuation theory can be found in the absence of a transfer of tangible assets. 219 Ariz. 186, ¶¶ 22-23, 195 P.3d at 651-52. But, in *Warne Investments*, unlike the situation here, the new and old corporations also shared key principals. *Id.* ¶ 19. In that case, the two companies "had identical or substantially similar directors, officers, and stockholders" and also "bore similar names." *Id.* In addition, two of the principals "admitted there was no real difference between the companies." *Id*. On those facts, the trial court's judgment, entered on a jury verdict in favor of the creditor against the successor corporation, *id*. ¶ 13, was affirmed on appeal because the record reflected that the successor company simply "stepped into the shoes" of its predecessor company. *Id*. ¶ 29.

**¶18** The record here, in contrast, does not compel that finding. The ownership of Alpine is completely different from that of Kachina, and Moore had no interest or role in the new company beyond a limited amount of free advice he gave when Alpine first started. Beals has not cited any authority supporting the proposition that mere-continuation, successor liability can be imposed in the absence of similarity of ownership between the old and new corporations. *See* Ariz. R. Civ. App. P. 13(a)(6). He argues, however, that "Purcell was aware of . . . [Beals's] outstanding judgment, and obviously saw an opportunity to continue Kachina's business under Alpine and his ownership free of the judgment against Kachina." And, he maintains, "[t]his is precisely what the successor corporation and fraudulent conveyance doctrines were designed to prevent." We disagree.

**¶19** As noted above, "[i]n Arizona, the general rule for successor liability is when a corporation sells or transfers its principal assets to a successor corporation, the successor corporation is not liable for the former corporation's debts and liabilities." *Warne Invs.*, 219 Ariz. 186, ¶ 16, 195 P.3d at 650. It is only when "'[a] corporation goes through a mere change in form without a significant change in substance [that] it should not be allowed to escape liability.'" *Id.* ¶ 18 (first alteration in *Warne Invs.*), *quoting Gladstone v. Stuart Cinemas, Inc.*, 878 A.2d 214, ¶ 19 (Vt. 2005). On this record, the trial court could find that the change was not simply one of form, but rather of substance—Alpine had entirely different ownership than Kachina. Unlike the situation in *Warne Investments*, where the owners of the original corporation would have continued to profit from the new corporation free from the old corporation's liability, *id.* ¶ 11, the record here does not reflect that Moore was profiting from Alpine's operation.[7] Thus, we cannot say as a matter of law that a new corporation, under entirely different ownership—a significant change in substance—should be held liable for the debts of a former business merely because the two were engaged in the same field and the new company presumably will profit from its business.

**¶20** Additionally, as discussed above, we cannot say the trial court erred in finding Kachina had not transferred any assets—tangible or intangible—to Alpine. In the absence of such a transfer, Beals's successor corporation claim necessarily fails. *See Warne Invs.*, 219 Ariz. 186, ¶ 18, 195 P.3d at 651 ("assets passing to the new company" for inadequate compensation required for successor liability). In sum, as Beals rightly conceded at oral argument in this court, the trial court's ruling on Beals's successor corporation claim was neither clearly erroneous nor contrary to law.

**Disposition**

**¶21** The judgment of the trial court is affirmed. In our discretion, we deny Alpine's request for attorney fees made pursuant to A.R.S. § 12-1580(E). *See Able Distrib. Co. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 410, 773 P.2d 504, 515 (App. 1989).

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JOHN PELANDER, Chief Judge

[7]Beals argues that Alpine could "reinstall[] Moore in an ownership position once this litigation is over." But, as he admits, "there was no direct evidence adduced that there was a secret deal between Purcell and Moore."

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

E S P I N O S A, Judge, specially concurring.

**¶22** I concur, but write separately to express some reluctance in doing so in view of substantial evidence in the record of collusion between long-time friends Purcell and Moore for the purpose of circumventing Beals's judgment against Moore, including evidence that Moore, in fact, continued to work at Alpine in a principal capacity, and evidence that Purcell indeed received considerable value inherent in an on-going business when he, essentially, converted Kachina to Alpine, using the same workforce, location, facility, and customer base. Had the trial court so ruled, this court would readily affirm. However, as my colleagues correctly point out, under our standard of review we must defer to the trial court's judgment if there is evidence in the record to support it, even if much of it was contradicted. *See Kocher*, 206 Ariz. 480, ¶ 9, 80 P.3d at 289. Accordingly, I join in the majority decision to uphold the trial court's decision, however unsatisfactory, in this case.

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PHILIP G. ESPINOSA, Judge